THE ADVANCEMENT OF RELIGION—A FORM OF CHARITY?

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When I was asked to join a panel discussion on the charitable status of churches and religious orders, I was intrigued by the thought that a paper on the subject was to be read by a member of the practising Bar, and commented upon by an academic. It is seldom that the interests of the Bar and the academic so closely intertwine, and I was therefore delighted to accept the invitation. You can imagine my disappointment then when last evening the chairman informed me that the speaker was not able to present his paper, and asked me to take his place with my own comments on the subject. So here I am translated from handmaid to your guide, philosopher and friend on the subject, all in one package.

Left without the guidelines that the paper would have given me as to the nature of your interest in this topic, I am assuming that there is a limited number of you interested in that esoteric jungle known as the definition of 'charity', and that you would like something more than an analytical half-hour with *Gilmore v. Coats*,[1] albeit that it is the leading case on the subject. So I have decided to cast my thoughts in a somewhat wider vein, to invite you to consider a fairly fundamental problem that the common law has faced in connection the advancement of religion as a form of charity. Maybe it is a problem that can never be satisfactorily answered; maybe it can be answered. Let's see.

A student of the law of charity might be forgiven for thinking that religion presents little difficulty. After all, he may say, the tests by which you determine whether the particular gift is charitable cannot be difficult to apply. First you ask whether the purpose of the gift is concerned with the advancement of religion, and, if it is, you then ask whether the gift is for the public benefit. Is there really any problem today with religion? But, of course, as we all know, it is one thing to say what the tests are, it is another to apply them, and in the most unexpected ways problems can occur.

I was reminded of this during the summer when my father, who practices law on the south coast of England, told me of a difficulty he had run into. For many years his firm has acted for a nearby convent, and for the same number of years, it seems, the Order has been providing accommodation, nursing and care for mentally incapable women. Today the nuns are elderly, they find it almost impossible to attract young novitiates to the Order, and therefore they feel they are compelled to give up the work of nursing and care. What they

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would like to do is to turn over their buildings to the local municipal authority which could then carry on with the care of these mentally incapable women out of public funds. The nuns, however, would retain one of their detached buildings, and there they would live an entirely cloistered life, spending their time in private spiritual devotions.

The local municipal authority has said it would be pleased to accept the buildings offered, and seems prepared to carry on the work the nuns are doing, but a problem has now arisen concerning the liability of the retained detached building for rates, or, if you will, municipal taxes. The nuns have expended their moneys freely during the days of their nursing and caring for the incapable, and it will be a serious matter for them if they are now to be rated. Moreover, several of them, having property of their own, have made wills leaving that property to the convent. If the proposed contemplative style of life is adopted, are these gifts any longer valid? Even if valid, are they not now caught for estate duty? At first impression, you see, the nuns are planning a course of action which will result in their convent losing its charitable status because of the decision of the House of Lords in *Gilmour v. Coats.* Not only is the convent organized as a trust, but the intended testamentary gifts are made in a variety of different verbal ways to or for the trust. However, does the House of Lords decision apply where it is not the rule of the Order which requires a life of solitary contemplation, but in large measure that the nuns have grown too old for physically demanding acts of devotion? Alternatively, can these nuns be classed with retired clergy; can they be properly regarded as retired religious who were previously nurses and social workers? What they then do with their retirement is their business, as much as if you and I decide to spend our retirement together on the golf course. Yet again, if they offered accommodation to other elderly nuns, may they be seen as setting up a home for old persons?

This bizarre but enforced line of reasoning leads me to the problem I want to put to you. It concerns gifts to contemplative orders of monks and nuns, and gifts by way of trust foundation for the saying of masses for the repose of the souls of the dead. It may strike you as a singularly remote corner of the law of charities, but I think the example I have given you points up the kind of very practical difficulty that can arise.

It sometimes seems as if the law in England, as it is to be found in Lord Simonds' judgment in *Gilmour v. Coats,* represents the sturdy Protestant ethic which would have inspired Galsworthy's Soames Forsythe. If it's religion, then we expect to find good works being done, and good works can be seen and recorded by the whole of society. Consequently, gifts for contemplative orders are not charitable and a similar fate, the House suggested, may be awaiting gifts by way of trust for the saying of masses. On the other hand, these gifts are directly inspired by Catholicism, and so, as you can imagine, a very dif-

ferent view is taken by the weight of judicial authority in the Republic of Ireland.[2] Wherever the Irish have gone, they have taken the problem with them. In Northern Ireland the Catholic donor might well expect that the same view will be taken there as in the south. But he will probably be wrong. An appeal lies from Northern Ireland to the House of Lords itself, and there is not the slightest reason for imagining the House would come to a different conclusion because of the origin of the litigation. In the High Court of Australia in 1917 you will find that opposition to gifts by way of trust for the saying of masses was dismissed and such a gift upheld,[3] while in 1959 the Privy Council, invited to consider a gift for a contemplative order in New South Wales[4] adhered to the decision of the House in *Gilmour v. Coats.*

The story in Canada is a curious one. It's a story of silence and of misunderstanding. Silence because most of the provinces have had nothing to say on the subject; misunderstanding because a decision of the Ontario Court of Appeal in 1932, holding that trust gifts for masses for the dead are charitable,[5] was based upon an incorrect representation of the decision of the House of Lords in *Bourne v. Keane* in 1919.[6] It would be most interesting to hear what the Supreme Court today would make of *Re Hallisy* because, if you remember that decision, both the Dominion Law Reports and the Canadian Abridgment state that that case overrules *Re Zeagman,*[7] a decision of a first instance Ontario court. I am not at all sure that that is correct. The Court of Appeal did not say that it was overruling *Re Zeagman,* and, in view of *Bourne v Keane* and the later decision in *Gilmour v. Coats,* I would have thought *Re Zeagman* was the correct decision.

Nevertheless, let me approach the subject from the point of view of what the advancement of religion consitutes. The problem is that when the advancement of religion first was brought before the courts it was as early as 1639.[8] Religion was then as vital a topic as politics is today, its whole philsophy was the salvation of man, and, in view of the long association of charity with the church, it was practically unthinkable that any court would hold that the advancement of religion itself was not charitable. From 1639 to the present day, therefore, the advancement of religion has been one of the prime forms of charity. But, of course, you can see what the problem was going to be. How do you measure whether a religion is acceptable, or which of the various religious practices advance religion? You can measure education. Some might of course doubt that. Most people outside the universities know for what purpose a university exists, but in my experience few university teachers are able to agree on the subject. You will find that the taxpayer is quite clear as to what is education, but you will not necessarily find his view shared by the teacher of literature, music, or the fine arts. But on the whole I suppose one might say that we can all assess pragmatically what consitutes the advancement of education. We can also assess what is for the relief of poverty, and most of us

would recognise without much difficulty the relief of suffering.

But once you move into the area of religion, you are in a totally different situation. What on earth - if I may put it that graphically - is the yardstick by which you measure whether a gift is for the advancement of religion? This has been a perennial problem, and it is complicated by the fact that views on the subject change with the centuries, even the decades. The seventeenth century would have judged religion in terms of denomination, the eighteenth century would have been fairly tolerant towards different forms of Protestantism, equivocal towards Judaism, and hostile to Roman Catholicism, while the nineteenth century valued and cultivated the art of toleration. Today society would view religion objectively as a phenomenon like any other movement of thought. In large part it is the long political background of religion and the changing of views which have driven the courts ever further from making any real definition of religion or its advancement.

However, in determining whether a particular gift is for the advancement of religion, three questions must be answered. First, is the practice a religion? Secondly, is the particular activity which the donor had in mind one which advances religion? Thirdly, is the activity for the public benefit? Let us look at those three questions more closely.

Is the practice a religion? The case authorities are marked by their generosity on this topic. As one would expect, all forms of Christianity have been accepted, including such organisations as the Salvation Army and the Jehovah Witnesses.[9] Judaism has been recognised,[10] as have other religions such as Buddhism and the Ba'hai faith.[11] In Singapore Hinduism has been recognised, and there is no reason to believe that that and other world religions would not be accorded recognition in Canada. Overall I think it is fair to say that the definition of religion which the courts have taken as a working rule is worship of the Supreme Being. But in the famous and fascinating case of *Thorton v. Howe*[12] Lord Romilly said the courts would not inquire into whether the tenets of any faith are true. That is beyond the competence of the court. He thought the line would be drawn so as to exclude any religion which is subversive of all morality and contrary to the very character of religion.

I had never met one of these until I opened the *Montreal Star* on the 27th of March last, and the following headline caught my eye, "What a Church! — nudes, stag films, free beer." It turned out that an enterprising bar owner in Pasadena, California, who entertained his clients with nude female dancers and erotic films, and whose entertainment licence had been revoked because of these exhibitions, had hit upon the bright idea of re-opening as a church, but providing the same entertainment. So he changed the name of his establishment from the Hi-Life Bar to the Hi-Life Social Club Church, and designated himself as "the ancient highest high priest" of this Church. According to the reporter, the authorities were now at something of a loss. Offcials were of the

opinion that the operation was legal. I would have thought that few courts in Canada or anywhere else would have had much difficulty with this one. It seems clearly to be subversive of morality, even if the "high priest" and his "congregation" did regard themselves as worshipping the Supreme Being through the pursuit of the high life. Not that the idea was without a certain compelling touch. Instead of selling beer to the "faithful", as they watched the spectacles he provided, the "high priest" dispensed his beer for no charge, and later sent round a collection plate. "We try to make them happy," he said, "and if we succeed in making them happy we accept their contributions, as any church would." He certainly seemed to have out-flanked the state alcoholic beverage commission. I think that must have been the sort of thing which Lord Romilly had in mind!

As far as advancement is concerned, what the courts seem to require there is that the activity in question must in some way further or carry forward the particular enterprise, whatever it is. Education is advanced when people teach or research; religion is advanced when people carry out the rites of the faith or propagate it.[13] It's a fairly nebulous requirement, and that is perhaps why advancement has sometimes been discussed by the courts in terms of public benefit. That is to say, religion is advanced when its rites are publicly discharged or its creed is being disseminated. But that is really to confuse two things. It seems to me it is better to think of advancement as merely an act which furthers or carries out the intended practices of the religion.

Assuming then that our would-be charity has jumped both of these two hurdles, it now comes to the last. The intended benefit has to be for the public benefit. And this is where the problem starts, because the House of Lords has said that the claimed public benefit must be something which the courts can assess.[14] But how do you assess whether the public at large or a sufficiently large section of the public will be benefited when it is a religion that you are assessing? What are you looking for? What is it you want to measure or assess? It was in the heyday of Queen Victoria's reign that the English view was settled. Do you remember the famous case of *Cocks v. Manners*?[15] That case concerned a convent of nuns engaged in a cloistered contemplative life of prayer and self-denial, and the Vice-Chancellor came firmly to the view that what is needed, if the court is to be able to find a public benefit, are acts of mercy or other observable manifestations of the faith. It may be to the benefit of the ladies concerned that they lead such a life, but whatever they do in private is of no observable or assessable benefit to the public at large, even if the evidence is accepted that a sufficient section of the public, namely, the faithful of the same religion, believe themselves to be benefited by the intercessory prayers of the cloistered religious.

Of course, you will see that after that the courts were inevitably set upon a line of inquiry in such cases as this which could only prove painful to believers,

and yet amuse the cynical. It might well be true that the court must have some tangible or worldly evidence of benefit accruing before it can say whether or not public benefit will in fact arise from the gift in question, but this overlooks the fact that the stuff of religion is belief. If the advancement of religion is to be charitable, then does it not involve the proposition that at some point the law accepts the phenomenon of belief and ceases to demand empirical evidence? Does it not mean that in some situations the courts have to accept the testimony of the faithful that because of their faith they do derive benefit from the private acts of priests or cloistered religious?

This is the view to which the courts have come in the Republic of Ireland. It was in 1875, four years after *Cocks v. Manners*, that Chief Baron Palles - the grand old man of Irish law who sat on the High Court bench for no less than forty-eight years - followed the decision of the Vice-Chancellor that public benefit must be objectively demonstrable.[16] Yet in 1906 unequivocally he changed his view.[17] Typical of the man, he did not shilly-shally, he said he had now come to the decision that, once the particular religion has been recognised and the activity in question accepted as advancing religion, that is the end of the inquiry a court of law can make. It has no reasonable alternative but to accept reliable evidence that the faithful believe themselves, as a section of the public, to be benefited by intercessory prayer or masses offered for the dead.

I suppose you could say that the Chief Baron was making this point: it is no more psssible to say that public benefit does not ensue in these circumstances than that it does ensue when the faithful are gathered together in a church, singing lustily, "All things bright and beautiful, the Lord God made them all."

Anyway, that judgment of 1906 echoed round the common law world. In *Bourne v. Keane* the House of Lords decided that it was not unlawful for a donor to make an out-and-out gift for the saying of masses for the dead, two years earlier the High Court of Australia decided that a gift by way of trust for the same purpose was valid,[18] and it began to look as if a change of judicial opinion was now well under way. Then in 1946 Professor Newark published in the Law Quarterly Review his celebrated paper saying it was about time the English courts adopted the criterion that public benefit is co-incident with the finding that the particular gift advances religion. [19] The stage was now set for the test case of *Gilmour v. Coats.* Charles Russell[20] was briefed, whose father[21] had pleaded and won in *Bourne v. Keane* in 1919, and the assault on *Cocks v. Manners* began.

I promised I would not bore you with a disquisition on *Gilmour v. Coats,* so let me just underline that the 1906 view of Chief Baron Palles was flatly rejected. Lord Simonds forcefully made the point that it was beyond question that any court in the realm was going to release itself from its duty to determine whether a gift is indeed for the public benefit. It is a question of law, he said, as

to whether a gift is charitable; the test of public benefit has therefore to remain objective in order that the courts may discharge their duty. On this basis was by-passed the lengthy affidavit of Cardinal Griffin of Westminster concerning the beliefs of the Roman Catholic Church in relation to contemplative orders. I'm not going to determine whether the Cardinal's evidence is concerned with matters of fact or opinion, said Lord Simonds, I'm going to decide that the court has no means of assessing whether public benefit is present. And so the saga ended.

A few years later a committee was appointed in Northern Ireland under Professor Newark to examine the law of charities in that province, but on the subject of masses for the dead and gifts on trust to closed orders of religious the view was taken by the committee that constitutionally, because of the fiscal implications, the province might not have jurisdiction. In these circumstances, and in view of the declared opinion of the House of Lords to which appeals from Northern Ireland can be carried, it was decided by the committee not to make any recommendations.[22] So that put the mater on ice.

In the remainder of the Commonwealth common law jurisdictions, it has also gone into limbo. Decisions in Scotland[23] and New Zealand,[24] as well as Australia, have upheld the validity of trusts for the saying of masses, and there is also a first instance opinion to the same effect in England.[25] But then you have to remember the doubt which was cast upon these trusts by the House of Lords, and to recall that where the Privy Council still has jurisdiction the same doubts must also exist because of the persuasive force of House of Lords' decisions in the Judicial Committee of the Privy Council.

In Canada, as I say, we do have the decision of *Re Hallisy* in Ontario upholding the charitable status of trusts for the saying of masses, but the Court of Appeal seems to have got hold of the wrong end of the stick as to what the House of Lords decided in *Bourne v. Keane.* In general the Supreme Court has said nothing to suggest it would depart from the Lords' reasoning and decision in *Gilmour v. Coats.* This means that another cloud of doubt hangs over *Re Hallisy* as far as masses are concerned, and that gifts on trust for cloistered orders are probably void.

So there is the situation. Canada seems to be in a suspended position between the approval of the Republic of Ireland and the disapproval which exists wherever the House of Lords and the Privy Council have final appellate jurisdiction. The problem is what to do about it. Should the Canadian common law jurisdictions adopt the subjective test, which the Chief Baron advocated so eloquently in 1906, or should they settle for the objective test which Lord Simonds argued so forcefully in 1949? There is obviously a lot to be said for Lord Simonds' position, but I think there is also a good deal going for the opinion of Chief Baron Palles.

In making up your mind though, you should not forget that what cannot be

done by way of trust may well be accomplished by way of an out-and-out gift. If you advise your client to make a gift to a named priest or to a church, shall we say, and make it clear in the language of disposition that you are not creating a trust, I cannot think that such a donor would object that there is only a moral obligation upon the donee to say the desired masses. But, if the would-be donor does object, you can always suggest something like a gift to a named church so long as a priest says the intended masses, and a gift over to the diocese on termination of the first gift.[26] Similarly, while your client runs full tilt into *Gilmour v. Coats* if he makes an edowment gift to an unincorporated body of cloistered religious, he can always make an out-and-out gift to the community members at the time when the instrument of gift takes effect, suggesting how he had thought that the money, or land, or whatever it is, might be used by the community.

However, if you can approximately achieve in these ways what the donor wants, then the problem I have put to you surely one of form, not of substance. To me this highlights the silliness of the obstruction which we have to place before donors. If it were up to me, I would recognise that when in the early seventeenth century the courts interpreted the charitablility of the repair of churches[27] as meaning the advancement of religion, they embarked on a policy of validation where the usual tests of societal benefit are not relevant. I admit I have no idea how familliar these gifts are in practice in Canada, or what amounts of property are involved, but I would have guessed they are fairly minimal in significance. If I am right in that, I think that is another reason why the decision of Chief Baron Palles in 1906 makes good sense. This is an age of dominant secularism, these are the only two types of gift for religious purposes which in practice have run into this difficulty with the law of charity, and one would have thought that today we can afford a generosity which the fears and resentments of the past arrested in our forbears. My own family roots lie deep in the Protestant ethic, so perhaps I can claim to be entirely disinterested when I suggest the time has come for statutory reform in the provinces to make valid these trust gifts. The Republic of Ireland has already shown us what form this statute might take.[28]

On the other hand, you may totally disagree. You may feel with Lord Simonds that, whatever the nature of the gift, the law has to retain the requirement of the demonstration of public benefit, that it is not good enough for a religion to prove itself genuine and thereafter determine the extent of its own charitability. Some, I know, feel strongly about the amount of indirect subsidy which the churches and other religious bodies already enjoy at the expense of the general public. Of course, you realise that the problem I have put to you may go deeper into the whole issue of whether in any event indirect subsidies should be tied to the legal definition of charity.[29]

Footnotes

1. (1949) A.C. 426; (1949) 1 All E.R. 848.
2. See Keeton, G.W. and Sheridan, L.A., *The Modern Law of Charities*, 2nd ed., 1971, Northern Ireland Legal Quarterly Inc., p. 67.
3. *Nelan v. Downes* (1917), 23 C.L.R. 546.
4. *Leahy v. A.G. for New South Wales* (1959) A.C. 457; (1959) 2 All E.R. 300.
5. *Re Hallisy* (1932) O.R. 486; (1932) 4 D.L.R. 516. See also *Re Samson* (1967), 59 D.L.R. (2d) 132 (N.S.)
6. (1919) A.C. 815; (1918-19) All E.R. Rep. 167.
7. (1916), 37 O.L.R. 536. In *Re Hallisy* the Court left it to be inferred that *Re Zeagman* had been swept away by *Bourne v. Keane.*
8. *Pember v. Inhabitants of Kington,* 1 Eq. Cas. Abr. 95; Tot. 34; 21 E.R. 115, 905.
9. *Re O'Brien* (1959) 15 D.L.R. (2d) 484 (N.S.).
10. *E.g., Neville Estates Ltd. v. Madden* (1962) Ch. 832.
11. *Re Grand* (1945) O.W.N. 782; (1946) 1 D.L.R. 204.
12. (1862), 31 Beav. 14; 54 E.R. 1042. Lord Romilly's views were echoed among other by Hope J. in *Re Grand, surpa.*
13. Re Anderson (1943) O.W.N. 303, 305.
14. *Gilmour v. Coats, supra.*
15. (1871) L.R. 12 Eq. 574, a decision of Vice-Chancellor Wickens, a judge of no mean reputation.
16. *Attorny-General v. Delaney* (1875) I.R. 10 C.L. 104 (gifts to a named priest, and a named community, for the saying of masses).
17. *O'Hanlon v. Logue* (1906) 1 I.R. 247 (C.A.) (a gift to the Primate for the saying of masses).
18. See note 3, *supra.*
19. 'Public Benefit and Religious Trusts', (1946) 62 L.Q.R. 234.
20. Now Lord Justice Russell of the Court of Appeal.
21. Subsequently a judge of the Chancery Division and of the Court of Appeal.
22. Charity Committee Report (N.I.) Cmd. 396.
23. *Lindsay's Executor v. Forsyth,* (1840) S.C. 568.
24. *Carrigan v. Redwood* (1910), 30 N.Z.L.R. 244.
25. *Re Caus* (1934) Ch. 162.
26. *Christ's Hospital v. Grainger* (1849) 1 Mac. & G. 460; 41 E.R. 1343. This principle survives the new perpetuity legislation in Ontario and Alberta. In the other provinces, except Quebec, and in the territories, it is still possible to create a determinable but otherwise absolute interest and impose upon the donee the obligation to carry out some continuous task

(e.g., causing annual masses to be said for deceased persons). If the task fails at any time to be performed, the property falls back into the donor's estate: *Re Chardon* (1928) Ch. 464. It is essential, however, that the financing of the task should be a burden on the donee's own assets: *Re Dalziel* (1943) Ch. 277; (1943) 2 All E.R. 656.

27. From the preamble to the St. of Elizabeth, 1601 the source of the common law notion of the contents of charity. The repair of churches was then a charge on local authorities, and gifts for this purpose an evident relief of those funds.

28. Charities Act, 1961, s. 45. It bears repeating that an out-and-out gift for either of these purposes is unquestionably lawful. The doctrine of superstitious uses never applied in Canada.

29. Throughout this speech I took as a unit the authorities on the saying of masses and the cloistered orders of religious, but those who wish to go further will notice that the two lines of authorities can be treated separately, and it will then appear that the courts in the Republic of Ireland are less than unanimous when it comes to gifts for cloistered orders. Nor have I distinguished between those gifts where the donor requires the masses to be said in public, and those where the gift is silent on the matter. In his own will made in 1916 Chief Baron Palles left a gift for the saying of masses, but required that they be said when the public had access. He said he did this not because he doubted his own decision in 1906, but because, all Ireland being then a province of England, he did not trust the people "across the water". The story is told by the late Vincent Delaney in his delightful little biography, *Christopher Palles.* In addition to the materials mentioned in the footnotes above, the reader may wish to refer to a valuable piece by James Brady, 'Some Problems Touching the Nature of Bequests for Masses in Northern Ireland', (1968) 19 Northern Ireland L.Q. 357, and to V.T.H. Delaney, *The Law Relating to Charities in Ireland* (Dublin, 1962), which reproduces the Charities Act, 1961, with comments.